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81478-3
NO. ~~81481-3~~

SUPREME COURT OF THE STATE OF WASHINGTON

IVAN FERENĆAK,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON, AND THE BOARD OF INDUSTRIAL INSURANCE APPEALS,

Respondents.

DEPARTMENT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Ivan Ferenćak asked the Department of Labor & Industries to communicate through his attorney on his workers' compensation claim in English. But he later complained that the orders sent to his attorney were written in English. Through his attorney, Ferenćak timely appealed the Department orders that set his wages for his time-loss benefits. The Board of Industrial Insurance Appeals provided him with an interpreter for all the testimony and recorded statements throughout the hearing.

Ferenćak does not challenge the Court of Appeals holding that Department-level interpreter services are not at issue in this case, where he never appealed any Department decision denying him interpreter services. *Ferenćak v. Dep't of Labor & Indus.*, 142 Wn. App. 713, 727-28, 175 P.3d 1109 (2008). The only interpreter issue preserved in this case is Ferenćak's claim for reimbursement for interpreter expenses he allegedly incurred at the Board for his private communications with his attorney. He also challenges the substance of the wage computation. Ferenćak presents no issue appropriate for review under RAP 13.4(b).[1]

[1] Similar arguments were raised and rejected by the Court of Appeals in four other cases involving six other Bosnian-speaking claimants represented by the same attorney who represents Ferenćak. *See Meštrovac v. Dep't of Labor & Indus.*, 142 Wn. App. 693, 176 P.3d 536 (2008); *Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 175 P.3d 1117 (2008); *Mašić v. Dep't of Labor & Indus.*, No. 81759-6; *Resulović v. Dep't of Labor & Indus.*, No. 81758-8. As discussed in the Department answers, these cases do not equally preserve or present the issues claimed.

II. COUNTERSTATEMENT OF THE ISSUES

1. Is there any basis for this Court to review Ferenćak's claim for Department-level interpreter services, when he does not challenge the holding that such services are not at issue?

2. Is there any basis in law or fact to support Ferenćak's claim that he is entitled to reimbursement for interpreter expenses he allegedly incurred at the Board?

3. Did the Department properly exclude employer taxes for government benefits from Ferenćak's wage computation as not wages he received as part of the contract of hire?

4. Does the statutory wage computation based on Ferenćak's full-time employment already factor in his vacation and holiday pay (pay without actual work)?

5. Did the Court of Appeals violate equal protection in not raising on its own a factual question about Ferenćak's overtime hours, which he did not raise and thus waived?

6. Should this Court review Ferenćak's excuse for failing to produce proof of wage-includable bonus, when he was given an opportunity to obtain such proof, even if there was any, but failed to do so?

III. COUNTERSTATEMENT OF THE FACTS

A. Department Claim Administration

In March 2002, Ferenćak applied for workers' compensation, which the Department allowed. Certified Appeal Board Record (BR) 262 (stipulated history); Findings of Fact (FF) 1, 2.[2] In his letter of November 8, 2002, Ferenćak informed the Department he was represented by an

[2] Findings of Fact refer to those made by the Board in its final order (BR 1-12) and adopted by the superior court (CP 15-18). Copies of the superior court and Board orders are attached as Appendices A and B, respectively.

attorney. BR 91. In the same letter, he informed the Department he was limited in English proficiency (LEP) and asked the Department to provide "all interpreter services necessary for him to communicate with his counsel" on his claim and to send all of its correspondence to his attorney *in English*. BR 91. Beginning with the time-loss wage replacement order of December 2, 2002, the Department sent its correspondence to his attorney. BR 665, 713, 731, 741, 764, 752, 772, 780.

Ferenćak appealed to the Board a Department order that set his wages for his time-loss benefits and other related orders, challenging the wage computation. BR 86-91, 623-26, 658-61, 714-17, 732-35, 742-45, 753-56, 765-68, 773-76, 781-84; FF 1. In his notices of appeal, he asked the Department and the Board to provide interpreter services for all communications necessary for him to receive benefits.[3]

B. Board Proceeding

The Board provided Ferenćak with an interpreter at its expense for all the testimony and recorded statements throughout the hearing, but not for private communications with his attorney or deposition. BR 188-90. The only deposition was of Ferenćak's economist conducted by his

[3] His request included interpreter services for all "communications addressed to him, his lawyer, to any of his treating physicians, to any provider for the Department, including all orders, letters, deadlines, jurisdictional histories and all contents of the Board file on this appeal and on any subsequent appeal to the Superior Court . . .." BR 86-91, 623-26, 658-61, 714-17, 732-35, 742-45, 753-56, 765-68, 773-76, 781-84.

attorney for a group of claimants, which Ferenćak did not attend.

The Board affirmed the Department wage computation, except to change the amount Ferenćak's employer paid for his medical and dental care. BR 1-12; FF 5. The Board concluded that Ferenćak was not entitled to have the Board pay for an interpreter for his private communications with his attorney. BR 11-12. The Board explicitly declined to address his claim for Department-level interpreter services because the Board jurisdiction was limited to reviewing the orders appealed, and no Department order addressed that topic. BR 3.

C. Court Proceedings

King County Superior Court granted the Board motion to intervene. CP 1-2. The court affirmed the Board decision and adopted all of its findings. CP 3-7 (memorandum opinion); CP 15-18 (judgment).

In a published opinion, the Court of Appeals affirmed. *Ferenćak*, 142 Wn. App. at 719-30. This petition followed.

IV. REASONS WHY THE COURT SHOULD DENY REVIEW

Ferenćak presents a number of interpreter and wage computation issues juxtaposed with a variety of constitutional provisions, statutes, rules, and policies, many raised for the first time before this Court. He offers scant analysis or authority to support his petition.

Review is not appropriate in this case, because the Court of Appeals properly followed established precedent in upholding the wage computation made by the Board and affirmed by the superior court. Most of Ferenćak's arguments on the interpreter issues lack support in the record, and thus there is no sound basis for review.

A. Department-Level Interpreter Services, Not Addressed In Any Appealed Department Decision, Are Not At Issue Here, And, In Any Event, Met Statutory And Constitutional Standards

Ferenćak presents statutory and constitutional arguments related to the Department provision of interpreter services and use of English during claim administration, as if these arguments were addressed and rejected below. Petition at 5-11. But the Board and the court below did not consider these arguments, because no appealed Department decision addressed them. *Ferenćak*, 142 Wn. App. at 727-28; BR 3; CP 5-6. Ferenćak does not challenge this holding. He thus waived any argument to the contrary and may not seek review of the issues precluded by it.

Nor is there any legal or factual basis for Ferenćak's rejected claim that the Department's use of English in its orders to him constituted an appealable denial of interpreter services. *Ferencak*, 142 Wn. App. at 728.[4]

[4] Ferenćak has not challenged the established principle that the Board jurisdiction is limited to what the Department has addressed in an action or decision aggrieving a party, and the court jurisdiction to what the Board has properly decided. *See* RCW 51.52.050, .115; *Sepich v. Dep't of Labor & Indus.*, 75 Wn.2d 312, 316, 450 P.2d 940 (1969) (court may not address matters not presented to the Board); *Hanquet v. Dep't*

Before hiring his current attorney, Ferenćak never requested any interpreter services from the Department. Although he requested interpreter services through his attorney, he asked the Department to send all of its correspondence to his attorney *in English*. BR 91, 665, 713, 731, 741, 764, 752, 772, 780. He cannot now reasonably claim the Department issuing orders in English denied him interpreter services.[5]

Even if there were some factual basis for Ferenćak's claim, there is no merit to his statutory or constitutional arguments on Department-level interpreter services. It is well-established that in civil cases involving only economic interests, neither due process nor equal protection requires government to provide notices or services to LEP persons in their primary languages. *See Kustura*, 142 Wn. App. at 683-89.[6] As to Ferenćak's

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of Labor & Indus., 75 Wn. App. 657, 661-64, 879 P.2d 326 (1994) (court may not address matters the Board improperly addressed without prior Department decision); *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761 (1970) (same).

[5] Also, the record does not support Ferenćak's claim "the Department knew the English orders could not be read by [him]." Petition at 8 n.7. He points only to the Board decision referring to the parties' stipulation on his LEP status. BR 2. There is no evidence about the *Department's knowledge* of his LEP status.

[6] The courts have consistently upheld English notices and services under due process and equal protection. *See Soberal-Perez v. Heckler*, 717 F.2d 36, 42-43 (2d Cir. 1983) (social security denial), *cert. denied*, 466 U.S. 929 (1984); *Guerrero v. Carleson*, 512 P.2d 833, 836-39 (Cal. 1973) (welfare), *cert. denied*, 414 U.S. 1137 (1974); *Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir. 1973) (unemployment benefit); *Alfonso v. Bd. of Review*, 444 A.2d 1075, 1076-78 (N.J. 1982) (same); *Hernandez v. Dep't of Labor*, 416 N.E.2d 263, 266-67 (Ill. 1981) (same); *Commonwealth v. Olivo*, 337 N.E.2d 904, 909-11 (Mass. 1975) (condemnation); *Toure v. United States*, 24 F.3d 444, 446 (2d Cir. 1994) (administrative seizure); *Frontera v. Sindell*, 522 F.2d 1215, 1218-21 (6th Cir. 1975) (civil service exam); *Guadalupe Org. v. Tempe Elementary Sch. Dist.*, 587 F.2d 1022, 1026-29 (9th Cir. 1978) (no right to bilingual education); *Moua v. City of Chico*, 324 F. Supp.2d 1132, 1137-39 (E.D. Cal. 2004) (police did not provide interpreter

statutory arguments, *Kustura* adopted the only reasonable interpretation that a "legal proceeding" covered by Washington interpreter statute, chapter 2.43 RCW, does not include Department *ex parte* claim administration. *Kustura*, 142 Wn. App. at 677-80. Established due process and equal protection law and *Kustura* provide clear guidance on these issues. Department Answer to Petition in *Kustura* at 9-15. Ferenćak offers no good reason for this Court to review these issues in his case.

Ferenćak argues, for the first time, that LEP workers receiving English orders are entitled to equitable relief from complying with the statutory appeal limits and reimbursement of interpreter expenses on their claims. Petition at 7 (citing *Rodriguez v. Dep't of Labor & Indus.*, 85 Wn.2d 949, 540 P.2d 1359 (1975)). His argument is too late. RAP 2.5(a). Further, it lacks merit because it misreads *Rodriguez*. *Rodriguez* held that an extremely illiterate Spanish-speaking worker's appeal from a Department order was *not* timely, because his receipt, not subjective understanding, of the order constituted "communication" to trigger the statutory appeal period. *Rodriguez*, 85 Wn.2d at 951-53. *Rodriguez equitably excused* his untimely appeal under the circumstances of that case. *Id.* at 954. *Rodriguez* did not address interpreter expenses or suggest that Ferenćak can raise interpreter claims at any time.

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for crime victims); *see also Nazarova v. INS*, 171 F.3d 478, 483 (9th Cir. 1999) (deportation hearing notice).

The Court should reject Ferenćak's invitation to address Department-level interpreter services, an issue he failed to preserve.

B. Chapter 2.43 RCW Did Not Entitle Ferenćak To Free Interpreter Services At The Board, And His Reimbursement Claim Lacks Merit

Ferenćak argues he is entitled to reimbursement of interpreter expenses he allegedly incurred when his appeals were at the Board. Petition at 3-5. To seek reimbursement, he relies on the limited holding in *Kustura* that once the Board appoints an interpreter for a LEP claimant under chapter 2.43 RCW, it must allow the interpreter to translate both the testimony and the claimant's private communications with his or her attorney *during the hearing*. Petition at 3-4; *Kustura*, 142 Wn. App. at 680-81.[7] His reimbursement claim does not merit review.

A Board hearing is a "legal proceeding" to which chapter 2.43 RCW applies. But the Board was not required to pay for interpreter services here, because it did not initiate the proceeding. *Ferenćak*, 142 Wn. App. at 728-29; *Kustura*, 142 Wn. App. at 680-81. The statute

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[7] Ferenćak failed to preserve his argument about the Board not providing an interpreter at the perpetuation deposition of his economist (which Ferenćak did not attend). *Ferenćak*, 142 Wn. App. at 729. In any event, chapter 2.43 RCW does not apply to "matters beyond the hearing itself, including communications with counsel outside of the hearing and other trial preparation." *Kustura*, 142 Wn. App. at 680 n.47; *Ferenćak*, 142 Wn. App. at 728. Ferenćak does not challenge these holdings.

If this Court accepts review of Ferenćak's claim premised on the Board not allowing interpretation of attorney-client communications during the hearing, the Department reserves the right to argue, as it did below, that such communications are not part of the "legal proceeding" under chapter 2.43 RCW. *See* RAP 13.4(d).

allocates interpreter costs to "the governmental body initiating the legal proceeding," RCW 2.43.040(2), or to "the non-English-speaking person, unless such person is indigent," RCW 2.43.040(3). Ferenćak initiated the Board proceeding by filing an appeal. RCW 51.52.060. He never claimed indigency. The statute thus allocated interpreter costs to him.

Ferenćak argues, for the first time, that the Department "initiated" a legal proceeding by virtue of its duty under RCW 51.04.020(6) to "investigate the cause of all serious injuries and report to the governor from time to time any violations or laxity in performance of protective statutes or regulations". Petition at 6. This argument is waived. RAP 2.5(a). Further, it makes no sense. There is no evidence the Department investigated the cause of his injury under RCW 51.04.020(6). Such investigation occurs only if and after a claimant fulfills his or her duty of reporting an industrial injury. RCW 51.28.010(1). Ferenćak's theory that the Department acts like police in fraud or other contexts is irrelevant.[8]

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[8] Ferenćak argues differently treating hearing-impaired and LEP persons violates equal protection, citing RCW 2.42.120(4) (providing interpreter services to a hearing-impaired person *interviewed by law enforcement in a criminal investigation*) and *State v. Marintorres*, 93 Wn. App. 442, 969 P.2d 501 (1999) (convicted defendant may not be assessed interpreter cost under RCW 2.43.040(4)). Petition at 5 n.4. But the Department did not interview him in a criminal investigation. Further, *Marintorres* is a criminal case, where "the government clearly initiates the proceedings". *Kustura*, 142 Wn. App. at 684 n.54; *see also State v. Gonzales-Morales*, 138 Wn.2d 374, 379, 979 P.2d 826 (1999) (criminal defendant's constitutional right to an interpreter).

In any event, in civil cases, there are rational reasons for providing different interpreter services for the hearing-impaired versus LEP. For example, sign language covers most hearing-impaired, while there are thousands of languages. *See* Raymond G.

Ferenćak seeks review of *what he claims* is a holding "he was not prejudiced by such expense and, therefore, entitled to neither *reimbursement* nor a new hearing." Petition at 4 (emphasis added). This is not the holding. The Court of Appeals held he was not entitled to free interpreter services, regardless of the merits of his case. *Ferenćak*, 142 Wn. App. at 728-29; *Kustura*, 142 Wn. App. at 680-81; *Meštrovac*, 142 Wn. App. at 709 n.21. The court engaged in the prejudice analysis only to see whether a reversal and a new hearing was required based on its conclusion that attorney-client communications at the hearing should have been translated. *Ferenćak*, 142 Wn. App. at 728-29; *Kustura*, 142 Wn. App. at 680-81; *Meštrovac*, 142 Wn. App. at 709 n.21.

Also, Ferenćak can point to no evidence he incurred any interpreter expenses for his alleged inability to consult with his attorney during the hearing. This factual deficiency precludes review on his reimbursement claim. *See Obert v. Envtl. Research & Dev. Corp.*, 112 Wn.2d 323, 335, 771 P.2d 340 (1989) ("We do not give advisory opinions.").

Further, Ferenćak offers no authority that persons incurring self-help, extra-statutory interpreter expenses are entitled to *reimbursement.* At most, costs may be awarded to a worker only if he or she prevails on

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Gordon, Jr., *Ethnologue: Languages of the World* (15th ed. 2005) (6900 plus living languages in the world), *available at* http:www.ethnologue.com; *World Almanac & Book of Facts* 731-32 (2006).

the merits in court, but Ferenćak did not prevail. RCW 51.52.130 (fourth sentence). Even if there was unlawful denial of interpreter services, the remedy is a remand for a new hearing, available only when denial was prejudicial to the outcome. *See, e.g., Guitierrez-Chavez v. INS*, 298 F.3d 824, 830 (9th Cir. 2002) (prejudice to the outcome required for remand for inadequate interpreter services). Ferenćak claims no such prejudice.[9]

Ferenćak's reliance on WAC 263-12-097 does not present a basis for review. Petition at 3 n.3. The IAJ "may" appoint an interpreter, and the Board "will" pay for the interpreter expenses. WAC 263-12-097. Pursuant to this regulation, the Board paid for the interpreter services provided to Ferenćak. No reading of this regulation requires the Board to pay for interpreter services *it does not provide.*

Ferenćak's passing citation to GR 33 is another new argument this Court should disregard under RAP 2.5(a) or reject for lack of merit. GR 33 requires accommodations (with certain exceptions such as undue burden) to a "person with a disability" covered by the Americans with Disabilities Act, chapter 49.60 RCW, or other similar local, state, or

[9] Ferenćak cites case law on waiver of an arbitration right that considers delay and expenses as "prejudice". Petition at 4; *Steele v. Lundgren*, 85 Wn. App. 845, 858, 935 P.2d 671 (1997) (party may waive right to arbitration by first conducting lengthy and aggressive litigation). The prejudice that may support a finding of a waiver of arbitration right is different from the prejudice in the outcome required for *a reversal.* "Absent a showing of prejudice to the outcome of the trial, an error does not constitute grounds for reversal." *Rice v. Janovich*, 109 Wn.2d 48, 63, 742 P.2d 1230 (1987).

federal laws. GR 33(4). Ferenćak provides no authority or analysis to show his LEP status is a "disability" covered by any of such laws.

Ferenćak's reimbursement claim lacks factual basis or merit and presents no basis for review.

C. The Court Of Appeals Properly Followed Precedent That Employer Taxes For Government Benefit Programs Are Not "Wages" Workers Receive As Part Of The Contract Of Hire

The Court of Appeals followed *Erakovic* which holds government-mandated employer payments for general fund benefits such as Social Security, Medicare, or Industrial Insurance are not "wages" under RCW 51.08.178.[10] *Ferenćak*, 142 Wn. App. at 725-27 (citing *Erakovic v. Dep't of Labor & Indus.*, 132 Wn. App. 762, 769-76, 134 P.3d 234 (2006)).[11] Similarly, government-mandated payments for unemployment compensation are not wages. *Ferenćak*, 142 Wn. App. at 725-27; *Meštrovac*, 142 Wn. App. at 712; *Kustura*, 142 Wn. App. at 689-91.

Ferenćak claims *Erakovic* was wrongfully decided and conflicts with *Department of Labor & Industries v. Granger*, 159 Wn.2d 752, 153 P.3d 839 (2007). Petition at 15-17. There is no conflict, because

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[10] Time-loss benefit rates are "determined by reference to a worker's wage at the time of injury." *Gallo v. Dep't of Labor & Indus.*, 155 Wn.2d 470, 481, 120 P.3d 564 (2005). Wages include the "reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire". RCW 51.08.178(1); *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 806-22, 16 P.3d 583 (2001) (employer paid healthcare under employment contract are wages); *Gallo*, 155 Wn.2d at 491-94 (retirement, life insurance, and certain other fringe benefits are not wages).

[11] The same attorney who represents Ferenćak represented worker Erakovic.

"*Granger* did not address whether government-mandated employer payments to general funds are 'consideration of like nature' under RCW 51.08.178(1)." *Ferenćak*, 142 Wn. App. at 726.[12] Government taxes for social funds are not "wages," in part because such payments, unlike those for healthcare, "are not earmarked for a specific employer's employees". *Erakovič*, 132 Wn. App. at 770. "The plain language of RCW 51.08.178 requires that any 'consideration' must be received from the employer as part of the contract for hire." *Id.*; RCW 51.08.178(1) (defining wages as "received from the employer as part of the contract of hire").[13]

Ferenćak offers no argument not raised in *Erakovič* and no good reason to suggest it was wrong. Review is not warranted on this issue.

D. Ferenćak's Vacation And Holiday Pay Was Properly Included In The Wage Computation Based On His Full-Time Work

RCW 51.08.178(1) requires compensation to be based on "the monthly wages the worker was receiving . . . at the time of injury," calculated by the dollars per hour, hours per day, and days per week "normally employed." RCW 51.08.178(1); *In re Kay Shearer*, BIIA Dec.,

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[12] *Granger* only addressed whether employer payments for an employee into a healthcare trust fund were received at the time of injury when the employee was not yet eligible for the healthcare. *Granger*, 159 Wn.2d at 759; *Ferenćak*, 142 Wn. App. at 726. *Granger* did not need to ask whether employer payments for healthcare are consideration of like nature, which *Cockle* had already answered yes. *Ferenćak*, 142 Wn. App. at 726.

[13] Also, these taxes do not meet another statutory requirement that wage-includable "consideration" be critical to workers' basic health and survival such that workers had to replace it during their disability. *See Erakovič*, 132 Wn. App. at 770-75 (following *Cockle* and *Gallo* critical survival test).

96 3384 & 96 3385, 1998 WL 440532 (1998), *aff'd, Fred Meyer, Inc. v. Shearer*, 102 Wn. App. 336, 339-40, 8 P.3d 310 (2000). This formula included Ferenćak's vacation and holiday pay (pay without actual work) based on his full-time work. *Ferenćak*, 142 Wn. App. at 723-24; FF 3.[14]

Ferenćak argues that the Court of Appeals *incorrectly assumed* he took time off work for all holidays and vacations. Petition at 14. He thus suggests he might have worked some holidays and vacations and received additional wages. His argument has no support in the record, ignores his burden of proof at the Board, and presents no basis for review.

Ferenćak, when appealing the Department wage computation at the Board, had the burden of proving it was incorrect. *See* RCW 51.52.050. Ferenćak did not testify or present any proof that he ever worked any of his vacations or holidays or that his employer would have allowed him to both work and receive additional pay. He thus failed to carry his burden of proof. *See Walters v. Ctr. Elec., Inc.*, 8 Wn. App. 322, 326-27, 506 P.2d 883 (1973) (vacation is presumed to be a right to receive regular pay during absence, and a worker can work and receive additional pay in lieu of paid absence only if an employment contract so permits). Ferenćak's

[14] *Shearer* does not support Ferenćak. The paid vacation and holidays a worker *received* should not be *deducted* from his or her *hours worked*, because they represent "benefits paid in lieu of work". *Shearer*, 102 Wn. App. at 340. Here, there is no claim that in computing Ferenćak's wage, the Department deducted from his hours worked any of his previously received vacation or holidays. *Ferenćak*, 142 Wn. App. at 723.

unsupported claim presents no basis for review.

E. Equal Protection Did Not Require The Court Of Appeals To Raise A Factual Issue On Ferenćak's Overtime He Has Waived

Ferenćak claims, which claim he did not make at the Court of Appeals, that overtime hours were erroneously excluded from his wage computation. Petition at 12-14. He argues, because the wage computation in *Meštrovac* included overtime hours, equal protection requires inclusion of overtime in this case. Petition at 12-14. He further claims he can raise this issue for the first time under RAP 2.5(a)(3). Petition at 14 n.18.

RAP 2.5(a)(3) requires a "manifest error affecting a constitutional right." Ferenćak "must identify a constitutional error and show how the alleged error actually affected [his] rights at trial." *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). He fails to do so. Rather, Ferenćak's argument is an unsupportable attempt to resurrect his waved challenge to the finding he did not normally work overtime at the time of his injury. FF 3. This is not an issue appropriate for review.

There is one reason the Court of Appeals did not address overtime pay in this case – because Ferenćak did not assign error to or make any argument to challenge the finding on his overtime. The unchallenged finding that he did not normally work overtime at the time of his injury thus became a verity. FF 3; *Willoughby v. Dep't of Labor & Indus.*, 147

Wn.2d 725, 733 n.6, 57 P.3d 611 (2002) (unchallenged finding is a verity). His waiver of a factual challenge does not create an equal protection issue.

Even if Ferenćak may resurrect his factual claim on some other ground, his claim fails under the substantial evidence standard. *See Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (substantial evidence standard of review for factual findings). He does not dispute that RCW 51.08.178(1) applies to his wage computation. The statute sets a worker's monthly wage based on his "normally employed" hours-per-day and days-per-week schedule at the time of his injury.

Ferenćak claims he "was paid overtime in the year before his injury". Petition at 12. But he refers only to a 2-week paystub for the period ending December 21, 2002. Petition at 12; BR Ex. 3.[15] His injury occurred on March 20, 2002. FF 2. What he received more than eight months *after* the injury does not prove what he received "at the time of injury." RCW 51.08.178(1). The finding he did not normally work overtime at the time of his injury was supported by his former employer's testimony that the employer did not have "regular overtime" and did not believe Ferenćak received overtime pay during the eight to nine months

[15] This answer refers to the Board exhibits as "BR Ex." The exhibits are in the Certified Appeal Board Record.

before his injury. Corwin (12/5/03) 21.[16]

Because Ferenćak did not normally work overtime at the time of his injury, his wage did not reflect any overtime pay. FF 3. The claimant in *Meštrovac* normally worked overtime and was allowed to include overtime hours in his wage, albeit at the regular, not premium, pay rate. *Meštrovac*, 142 Wn. App. at 711 n.31; RCW 51.08.178(1) (wages "shall not include overtime pay"). Ferenćak's equal protection argument lacks legal and factual support and presents no basis for review.[17]

F. Ferenćak Failed To Show Wage-Includable Bonus, And His Argument To The Contrary Lacks Factual Basis And Merit

Ferenćak claims the Court of Appeals improperly excluded his year-end bonus in his wage computation. Petition at 17-18. His claim is not borne out by the record and presents no basis for review.

A "bonus" may be included as "wages" only if, "*within the twelve months immediately preceding the injury*, the worker *has received* from the employer at the time of injury a bonus as a part of the contract of hire[.]" RCW 51.08.178(3) (emphasis added). Ferenćak was injured in

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[16] This answer refers to the testimony or statements at the Board proceeding by "TR" or the surname of the witness or the maker of the statement, followed by the date of the proceeding and the page number of the transcript where the testimony or statement is found. The transcripts are in the Certified Appeal Board Record.

[17] Ferenćak does not challenge the statutory exclusion of overtime premium. He only challenges the allegedly differential treatment in this and *Meštrovac* case. The claimant in *Meštrovac* raises an equal protection argument challenging the statutory overtime premium exclusion. That argument also lacks merit and presents no basis for review. Department Answer to Petition in *Meštrovac* at 16-20.

March 2002. FF 2. He admits there is no proof in the record he received any bonus within 12 months before his injury. Petition at 18.

For the lack of proof, Ferenćak blames the employer witnesses for failing to bring all subpoenaed documents, and the IAJ for not requiring or eliciting such documents. Petition at 18. His apparent challenge to the hearing process lacks merit and presents no basis for review. *See Ferenćak*, 142 Wn. App. at 727 n.34 ("Nothing in the record suggests this was an abuse of discretion by the IAJ.").

Ferenćak never testified nor inquired of employer witnesses as to whether he qualified for or received the year-end bonus for the year 2001.[18] Nor did he raise any objection when human resource manager McCadam testified he brought subpoenaed documents. McCadam (11/10/04) 7. Although McCadam later admitted he did not bring *certain* documents, Ferenćak never asked him if he brought any document on the 2001 bonus. As the IAJ pointed out, "at no time [during McCadam's testimony] did [Ferenćak] make that an issue." TR (11/10/04) 59.

Further, Ferenćak was given an opportunity but chose not to obtain additional evidence from McCadam. After McCadam was excused without objection and Ferenćak gave further testimony, Ferenćak's attorney asserted that she wanted more evidence from McCadam. Owen

[18] Ferenćak began his employment on June 11, 2001. Corwin (12/5/03) 10.

(11/10/04) 55-56. But Ferenćak's attorney then rejected the IAJ's response that she could elicit further evidence from McCadam by a perpetuation deposition. Owen (11/10/04) 56-59. There is no basis to review Ferenćak's excuse for the lack of proof of his bonus here.

Ferenćak further argues his wages should include the bonus he "would have received [at the end of 2002] if not injured." Petition at 18 (citing *Kilpatrick v. Dep't of Labor & Indus.*, 125 Wn.2d 222, 883 P.2d 1370 (1994)). His argument cannot be reconciled with the plain statutory language that a wage-includable bonus must be one a worker "has received" "within the twelve months immediately preceding the injury." RCW 51.08.178(3).[19]

Nor does *Kilpatrick* create a conflict for review. Ferenćak takes out of context the statement in *Kilpatrick* "the purpose of workers' compensation benefits is to reflect future earning capacity rather than wage earned in past employment." *Kilpatrick*, 125 Wn.2d at 230. *Kilpatrick* made this statement in determining which year benefit schedule should apply to a claimant who suffers separate asbestos-related diseases – "whether disability from a separate asbestos-related disease gives rise to a separate date of manifestation." *Kilpatrick*, 125 Wn.2d at 229. This

[19] A worker receives wages when his employer makes payment, regardless of the worker's eligibility for the wages. *Granger*, 159 Wn.2d at 759-66. Here, there is no evidence Ferenćak's employer paid bonus within 12 months preceding his injury.

statement "does not imply that speculative potential future earnings should be taken into consideration for wage calculations." *Ferenćak*, 142 Wn. App. at 724 n.25; *Kilpatrick*, 125 Wn.2d at 228 ("the relevant date for determining . . . benefits is the date of the worker's injury").

In sum, Ferenćak's wage arguments, like his interpreter service arguments, lack factual support or merit and present no basis for review.

V. CONCLUSION

For the reasons stated above, the Department requests that the Court deny Ferenćak's petition for review.

RESPECTFULLY SUBMITTED this 22nd day of August, 2008.

ROBERT M. MCKENNA
Attorney General

Masako Kanazawa

Masako Kanazawa, WSBA #32703
Assistant Attorney General
Attorneys for Respondent

Appendix A

Superior court order

WORKING PAPERS:
JUDGE MICHAEL HAYDEN
HEARING: 12-28-06 8:30 A.M.

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

IVAN FERENCAK,
Plaintiff,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,
Defendant,

BOARD OF INDUSTRIAL INSURANCE APPEALLS,
Intervenor.

CAUSE NO. 05-2-37144-7SEA

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

Clerk's Action Required

JUDGMENT SUMMARY (RCW 4.64.030)

1. Judgment Creditor:	State of Washington Department of Labor and Industries
2. Judgment Debtor:	Ivan Ferencak
3. Principal Amount of Judgment:	- 0 -
4. Interest to Date of Judgment:	- 0 -
5. Statutory Attorney Fees:	$200.00
6. Costs:	$0
7. Other Recovery Amounts:	$0

ATTORNEY GENERAL OF WASHINGTON
LABOR & INDUSTRIES DIVISION
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7740

8. Principal Judgment Amount shall bear interest at 0% per annum.

9. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum.

10. Attorneys for Judgment Creditor:	Maureen Mannix, John Wasberg Office of the Attorney General 800 Fifth Avenue Seattle, WA 98104-3188
11. Attorney for Judgment Debtor:	Ann Pearl Owen Attorney at Law 2407 14th Avenue South Seattle, WA 98144
12. Attorney for Intervenor:	Johnna Skyles Craig Office of the Attorney General P.O. Box 40108 Seattle, WA 98504-0108

This matter came on regularly before the Honorable Michael Hayden, in open court on August 7, 2006. The Plaintiff, Ivan Ferencak, was represented by counsel, Ann Pearl Owen; the Defendant, Department of Labor and Industries (Department), appeared by its counsel, Rob McKenna, Attorney General, per Maureen Mannix, Assistant Attorney General; Intervenor, the Board of Industrial Insurance Appeals, appeared by its counsel, Rob McKenna, Attorney General, per Johnna Skyles Craig, Assistant Attorney General. The Court reviewed the records and files herein, including the Certified Appeal Board Record, and briefs submitted by counsel, and heard argument of Counsel. Therefore, being fully informed, the Court makes the following:

I. FINDINGS OF FACT

1.1 Hearings were held at the Board of Industrial Insurance Appeals (Board) and testimony of other witnesses was perpetuated by deposition.

The Industrial Appeals Judge issued an initial Proposed Decision affirming the Department in the consolidated appeals by order dated April 15, 2005 from which Plaintiff filed a timely Petition for Review. The Board granted review, and affirmed the Proposed Decision and Order by issuing a separate order dated October 18, 2005.

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Plaintiff thereupon timely appealed the Board's order to this Court.

1.2 A preponderance of evidence supports the Board's Findings of Fact Nos. 1 through 9. The Court adopts as its Findings of Fact, and incorporates by this reference, the Board's Findings of Facts Nos. 1 through 9 of the October 18, 2005 Decision and Order.

Based upon the foregoing Findings of Fact, the Court now makes the following

II. CONCLUSIONS OF LAW

2.1 This Court has jurisdiction over the parties to, and the subject matter of, this appeal.

2.2 The Board's Conclusions of Law Nos. 1 through 4 are correct. The Court adopts as its Conclusions of Law, and incorporates by this reference, the Board's Conclusions of Law Nos. 1 through 4 of the October 18, 2005 Decision and Order.

2.3 The Board's Decision and Order of October 18, 2005 is correct and is affirmed.

2.4 The Board did not violate the constitutional due process or other constitutional rights of Mr. Ferencak in providing interpreter services or otherwise.

Based on the foregoing Findings of Fact and Conclusions of Law the Court enters judgment as follows:

III. JUDGMENT

3.1 The October 18, 2005 Board of Industrial Insurance Appeals Decision and Order, should be and is hereby affirmed.

3.2 The Defendant is awarded, and the Plaintiff is ordered to pay, a statutory attorney fee of $200.00.

3.3 The Department is awarded interest from the date of entry of this judgment as provided by RCW 4.56.110.

DATED this 19 day of December, 2006.

MICHAEL HAYDEN

MICHAEL HAYDEN, J U D G E

Presented by:
ROB MCKENNA

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WSBA No. 6409
Attorney for Department of Labor and Industries (substituting for AAG Maureen Mannix)

Copy received,
approved as to form and
notice of presentation waived:

ANN PEARL OWEN
WSBA No. 9033
Attorney for Claimant

JOHNNA SKYLES CRAIG
Assistant Attorney General
WSBA No. 35559
Attorney for Intervenor Board
Of Industrial Insurance Appeals

Appendix B

Board order

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: IVAN FERENCAK	DOCKET NOS. 02 21795, 02 22295, 02 22296, 02 22794, 02 23491, 02 23492, 02 23698, 03 15795, 03 16196, 03 16790, 03 17975, 03 18398, 03 19097 & 03 20291
CLAIM NO. Y-388825	DECISION AND ORDER

APPEARANCES:

Claimant, Ivan Ferencak, by
Ann Pearl Owen, P.S., per
Ann Pearl Owen

Employer, Travis Industries, Inc.,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Cynthia A. Montgomery and Maureen A. Mannix, Assistants

Docket No. 02 21795: The claimant, Ivan Ferencak, filed an appeal with the Board of Industrial Insurance Appeals on November 15, 2002, from a Department order dated May 6, 2002. In this order, the Department determined Mr. Ferencak's monthly wages at the time of injury for purposes of calculating his time loss compensation rate under the claim. The Department determined Mr. Ferencak to have earned $11.50 per hour, eight hours per day, five days per week, which equals $2,024 per month, plus additional includable wage equivalents for employer-provided health care benefits of $175 per month, for a total of $2,199 monthly wages at the time of injury. The Department did not include any tips, bonuses, overtime, housing, board, or fuel. The Department determined that Mr. Ferencak was married with two dependent children. The Board assigned Docket No. 02 21795 to this appeal. The Department order is **AFFIRMED.**

The remaining appeals, consolidated with Docket No. 02 21795, are Mr. Ferencak's appeals from orders paying and/or adjusting time loss compensation for particular periods. The amount of payments and adjustments are premised on the determinations made in the Department order appealed in Docket No. 02 21795. The appeals were docketed by the Board as follows: **Docket No. 02 22295**, an appeal filed on November 25, 2002, from a November 18, 2002 Department order; **Docket No. 02 22296**, an appeal filed on November 25, 2002, from a November 19, 2002 Department order; **Docket No. 02 22794**, an appeal filed on December 6, 2002, from a December 2, 2002 Department order, wherein the Department also terminated time loss

compensation effective November 25, 2002; **Docket No. 02 23491**, an appeal filed on November 15, 2002, from a May 2, 2002 Department order; **Docket No. 02 23492**, an appeal filed on November 15, 2002, from a May 14, 2002 Department order; **Docket No. 02 23698**, an appeal filed on November 15, 2002, from a May 28, 2002 Department order; **Docket No. 03 15795**, an appeal filed on May 23, 2003, from a May 20, 2003 Department order; **Docket No. 03 16196**, an appeal filed on June 4, 2003, from a June 2, 2003 Department order; **Docket No. 03 16790**, an appeal filed on June 18, 2003, from a June 16, 2003 Department order; **Docket No. 03 17975**, an appeal filed on July 30, 2003, from a July 28, 2003 Department order; **Docket No. 03 18398**, an appeal filed on July 3, 2003, from a June 30, 2003 Department order; **Docket No. 03 19097**, an appeal filed on July 18, 2003, from a July 14, 2003 Department order; and **Docket No. 03 20291**, an appeal filed on August 13, 2003, from an August 11, 2003 Department order. Each of these appealed Department orders are **AFFIRMED.**

PROCEDURAL AND EVIDENTIARY MATTERS

The industrial appeals judge affirmed the appealed Department orders in a Proposed Decision and Order issued on April 15, 2005. Mr. Ferencak filed a timely Petition for Review. This matter is therefore before the Board for review and decision pursuant to RCW 51.52.104 and RCW 51.52.106.

The critical appeal is the appeal assigned Docket No. 02 21795. In this appeal, Mr. Ferencak challenges the underlying Department order wherein the Department determined the basis for setting Mr. Ferencak's time loss compensation rate. This appeal adequately preserved Mr. Ferencak's right to have his time loss compensation payments appropriately adjusted were he to prevail and show that the Department had incorrectly determined his monthly wages at the time of injury. The Department and Mr. Ferencak stipulated that Mr. Ferencak did not read and understand English sufficiently to understand the import of the Department order dated May 6, 2002. They further stipulated that Mr. Ferencak's attorney filed the appeal from this order within sixty days of the date on which an interpreter communicated the order to him in terms that he could understand. We agree that the appeal is timely. The other appeals are timely for like reason, or because they were filed by mail within sixty days of receipt of the respective Department orders.

Mr. Ferencak is represented by an attorney. The Board provided interpreter services to Mr. Ferencak, to the party representatives, and to the industrial appeals judge during Mr. Ferencak's testimony. Mr. Ferencak contends that interpreter services should have been additionally provided him at the Department level, during communications with his attorney, and

during other proceedings at the Board. We find there was no unfair prejudice to Mr. Ferencak due to the Board not providing additional interpreter services. The matter of whether, and to what extent, the Department should have provided interpreter services is not properly before this Board. No written order of the Department denying such a request, if any was made, is before the Board in these appeals. Further, we have reviewed Mr. Ferencak's contentions in light of prior Board decisions and uphold our industrial appeals judge's determinations. See *In re Hajrudin S. Kustura*, Dckt. No. 01 18920 (June 18, 2003), with which Mr. Ferencak's counsel is familiar.

The Board has reviewed the remaining evidentiary and procedural rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings, including those within the Proposed Decision and Order, are affirmed.

DECISION

Ivan Ferencak sustained an industrial injury to his right knee on March 20, 2002, while working for Travis Industries, Inc. He had worked for Travis Industries, Inc., since June 11, 2001. He has had three surgeries on his knee. Mr. Ferencak has received time loss compensation for periods he has been off work since the date of injury because of the knee conditions, including periods of recovery from the surgeries. The Department of Labor and Industries established Mr. Ferencak's time loss compensation rate based on its determination of monthly wages at the time of injury and his married status and two dependent children. Determinations of monthly wages at the time of injury are governed by RCW 51.08.178. The monthly time loss rate is a percentage of the monthly wages with the particular percentage governed by RCW 51.32.060 and RCW 51.32.090, based on marital status and an injured worker's number of dependents.

Mr. Ferencak contends that the Department understated his wages at the time of injury under RCW 51.08.178. The Department included in Mr. Ferencak's wage determination earnings of $11.50 per hour, eight hours per day, five days per week, or $2,024 per month plus additional includable wage equivalents for employer-provided health care benefits of $175 per month, for a total of $2,199 monthly wages at the time of injury. The Department explicitly indicated it did not include any tips, bonuses, overtime, housing, board, or fuel.

Mr. Ferencak contends that the Department should have used a base hourly wage rate of $11.75 per hour and should have included overtime pay at a rate of $17.75 per hour. Mr. Ferencak contends the Department should increase his monthly wage determination to account for anticipated, further hourly wage increases. He further contends that amounts should have been added to "wages" for vacation pay, an anticipated bonus (profit sharing), employer contributions to

a 401K retirement plan, taxes paid for federal social security (retirement and disability) and for Medicare, employer-paid premiums or taxes for unemployment compensation, and employer-paid industrial insurance premiums or taxes.

We agree with our industrial appeals judge's determination that Mr. Ferencak has not met his burden to show that an additional amount for overtime pay should be included in his monthly wage determination. RCW 51.08.178(1) governs wage inclusions for regular workers such as Mr. Ferencak, as distinct from workers who are exclusively seasonal or essentially part-time or intermittent. Subsection (2) of the statute governs monthly wage determinations for workers who are exclusively seasonal or essentially part-time or intermittent. Subsection (1) allows for inclusion of hours normally worked regardless of whether these hours are referred to by the employer or worker as "overtime" hours. Subsection (1) does not otherwise allow for overtime pay, that is, any additional amount of pay per hour, to be included in the wage determination for regular workers. Overtime pay is included in the averaging method directed by subsection (2) for workers who are exclusively seasonal or essentially part-time or intermittent. Mr. Ferencak has not shown that he normally worked more hours than taken into account by the Department. Roy Corwin, Travis Industries' former Human Resources Manager, specifically indicated that Mr. Ferencak did not work regular overtime hours. 12/5/03 Tr. at 21. Mr. Ferencak has not contended that he was a subsection (2), exclusively seasonal or essentially part-time or intermittent worker. Therefore, neither overtime hours nor overtime pay should be included in his wage determination.

We are not aware of any authority that would justify including additional amounts in "wages" to account for anticipated increases in hourly wage rate. Clearly, RCW 51.08.178 refers to the monthly wages the worker was receiving from all employment "at the time of injury . . ." No consideration for anticipated wage increases beyond the date of injury is authorized by the statute. The Department and the industrial appeals judge correctly excluded from Mr. Ferencak's wage determination any consideration of such anticipated, but not actual, hourly wage increases.

Mr. Corwin did testify that Mr. Ferencak would have been qualified for the company's bonus or profit sharing plan in which payments were made as salary or wages to workers, but Mr. Ferencak was not working at the time of the year-end bonus. See 12/5/03 Tr. at 32-33. Jerry McCadam, Travis Industries' present Human Resources Manager, testified that Mr. Ferencak, by the time of injury, had worked 440 hours, just short of the 500 hours necessary to qualify in the year 2002 for the year-end bonus. He further testified that Mr. Ferencak, by returning to work later in the year, completed over 600 hours and did receive a bonus (profit sharing) distribution for 2002, which

was 2.32 percent of his gross wages for 2002. See 11/10/04 Tr. at 17-19. It may then initially appear logical to multiply this percentage times Mr. Ferencak's gross monthly wage at the time of injury and add this amount to the wage determination at the time of injury. Nevertheless, the Legislature adopted a different approach:

> If, within the twelve months immediately preceding the injury, the worker has received from the employer at the time of injury a bonus as part of the contract of hire, the average monthly value of such bonus shall be included in determining the worker's monthly wages.

RCW 51.08.178(3). Mr. Ferencak did not present testimony concerning whether he had received a bonus in the twelve months preceding the industrial injury of March 20, 2002. In light of the Legislature's given approach to bonuses, we feel constrained to deny Mr. Ferencak's request that we include any amount for a bonus in his wage determination.

We turn now to Mr. Ferencak's request that we include, in his monthly wage determination, potential employer contributions or payments to a 401K retirement plan, employer contributions or taxes paid for federal social security (disability and retirement benefits) and for Medicare, employer-paid premiums or taxes for unemployment compensation paid to Employment Security, and employer-paid industrial insurance premiums or taxes.

Travis Industries offered eligible employees a 401K matching contribution program. Eligibility required a full year of employment. The program was then available at the option of the eligible employee. At the time of injury, Mr. Ferencak did complete one year of employment. No contributions had been made by Travis Industries to a 401K plan for Mr. Ferencak as of the date of Mr. Ferencak's injury. We do not know of any authority to include in wage determinations amounts of benefits which the worker had not earned as of the time of the injury. Again, RCW 51.08.178 aims at determining earning capacity as demonstrated by wages at the time of injury. The statute does not focus our attention on any attempt to estimate or determine lost **future** earnings opportunities no matter how predictable and calculable those opportunities or future capacities might be. We reject Mr. Ferencak's contention that a value should be assigned to this potential future benefit and added to his monthly wage determination.

Our State Supreme Court adopted a view that the key phrase in RCW 51.08.178(1), "board, housing, fuel, or other consideration of like nature" means "readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity at the time of injury that are critical to protecting workers' basic health and survival." *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801, 822 (2001). Applying the reasoning in *Cockle*, this Board has previously rejected

contentions that pension contributions should be included in wages under RCW 51.08.178. See *In re Fred L. Jones*, BIIA Dec., 02 11439 (2003) and *In re Ronald Tucker,* BIIA Dec., 00 11573 (2001). We held these contributions are not of "like nature" with benefits such as food, shelter, fuel, and health care. Neither are such contributions non-fringe benefits critical to protecting the worker's basic health and survival. We used similar reasoning in denying inclusion of employer-provided life insurance contributions in wage determinations under RCW 51.08.178. See *In re Douglas Jackson*, BIIA Dec., 99 21831 (2001).

Workers have challenged application of the *Cockle* analysis to these other benefits or payments. Our State Supreme Court recently reaffirmed that its reasoning when it considers employer-provided health care in *Cockle*, is to be utilized also in determining whether the Department should include other benefits and payments similarly contended to constitute wages under RCW 51.08.178(1): employer contributions to union retirement trust funds, apprenticeship training trust payments, LECET account (for management-labor promotion), training, sick pay, life insurance, disability insurance, and union trust death and dismemberment protection. *Gallo v. Department of Labor & Indus.*, 75928-6 (September 29, 2005). We note that, in this case, the Supreme Court affirmed our determination in *Jones, supra.*

The *Gallo* court held that the contributions to union trust funds were not cash wages because they were not paid to, or controlled by, the individual worker. The *Gallo* court then clearly focused its interest on whether the benefits were critical to the basic health and survival of the worker "at the time of injury." *Gallo*, at 11. Retirement funds contributions, life insurance fund contributions, disability insurance fund contributions, apprentice trust fund payments, and LECET payments should not be included in wages because these are not cash payments to the worker and they are not critical to the worker's basic health and survival at the time of injury. *Gallo*, at 12.

We also find no merit in the idea that some additional amount should be included in "wages" to reflect the accrual of paid vacation or sick days. Mr. Ferencak has not produced any evidence to suggest that such a benefit increased his monthly income. He assumedly would receive the same pay whether or not he took advantage of a paid vacation day. A paid vacation day or sick day is of no different value to an hourly wage earner than is the value of a weekend or holiday or other day off with pay to a monthly or yearly salaried worker. The day off is not a cash equivalent paid to the worker. It is not disposable for cash and it does not replace some expenditure the worker would have to make for basic survival and health at the time of injury.

For similar reasons we reject Mr. Ferencak's contentions that the Department should have included in his wage determination employer contributions or taxes paid for federal social security (disability and retirement benefits) and for Medicare, employer-paid premiums or taxes for unemployment compensation paid to Employment Security, and employer-paid industrial insurance premiums or taxes. These are not, under the *Gallo* and *Cockle* analyses, a wage equivalent paid to the worker, nor are they benefits critical to the worker's basic health and survival at the time of injury. Rather, the payments are payments required by law to governmental entities. If otherwise qualified, Mr. Ferencak would receive benefits due from such entities without regard to whether Travis Industries had met its legal obligations to pay such taxes or premiums. Mr. Ferencak exercises no control over these monies paid to governmental entities.

We have considered the Proposed Decision and Order and Mr. Ferencak's Petition for Review. Based on a thorough review of the entire record before us, we enter the following:

FINDINGS OF FACT

1. On March 26, 2002, the Department received an application for benefits from the claimant, Ivan Ferencak, in which he alleged he sustained a right leg injury on March 20, 2002, in the course of his employment with Travis Industries, Inc.. On April 15, 2002, the Department allowed the claim for right leg injury as Claim No. Y-388825.

Docket No. 02 23491: Mr. Ferencak filed an appeal on November 15, 2002, from a Department order dated May 2, 2002, wherein the Department paid time loss compensation benefits from April 12, 2002 through April 26, 2002, and set the time loss rate for the payment period at $1,396.50 per month.

On January 3, 2003, the Board granted the appeal, subject to proof of timeliness, assigned Docket No. 02 23491, and directed that further proceedings be held. The parties stipulated that the appeal was filed within sixty days after an interpreter communicated to Mr. Ferencak the significance of the Department order, and that without such interpretation Mr. Ferencak was unable to comprehend the order.

Docket No. 02 21795: Mr. Ferencak filed an appeal on November 15, 2002, from a Department order dated May 6, 2002, wherein the Department described the wage rate calculation method: wage for the job of injury was based on $11.50 per hour, eight hours per day, five days per week, which equals $2,024 per month; additional wage for the job of injury include: health care benefits of $175 per month; tips, none; bonuses, none; overtime, none; housing/board/fuel, none; worker's total gross wage is $2,199 per month; marital status eligibility on the date of this order is married with two children.

On December 12, 2002, the Board extended the time to act on the appeal for an additional ten days. On December 24, 2002, the Board extended the time to act on the appeal for an additional ten days. On January 3, 2003, the Board granted the appeal, subject to proof of timeliness, assigned Docket No. 02 21795, and directed that further proceedings be held. The parties stipulated that the appeal was filed within sixty days after an interpreter communicated to Mr. Ferencak the significance of the Department order, and that without such interpretation Mr. Ferencak was unable to comprehend the order.

Docket No. 02 23492: Mr. Ferencak filed an appeal on November 15, 2002, from a Department order dated May 14, 2002, wherein the Department paid time loss compensation benefits from April 27, 2002 through May 10, 2002, and set the time loss compensation rate for the period at $1,396.50 per month.

On January 3, 2003, the Board granted the appeal, subject to proof of timeliness, assigned Docket No. 02 23492, and directed that further proceedings be held. The parties stipulated that the appeal was filed within sixty days after an interpreter communicated to Mr. Ferencak the significance of the Department order, and that without such interpretation Mr. Ferencak was unable to comprehend the order.

Docket No. 02 23698: Mr. Ferencak filed an appeal on November 15, 2002, from a Department order dated May 28, 2002, wherein the Department paid time loss compensation benefits from May 11, 2002 through May 24, 2002, and set the time loss compensation rate for the period at $1,396.50 per month.

On January 3, 2003, the Board granted the appeal, subject to proof of timeliness, assigned Docket No. 02 23698, and directed that further proceedings be held. The parties stipulated that the appeal was filed within sixty days after an interpreter communicated to Mr. Ferencak the significance of the Department order, and that without such interpretation Mr. Ferencak was unable to comprehend the order.

Docket No. 02 22295: Mr. Ferencak filed an appeal on November 25, 2002, from a Department order dated November 18, 2002, wherein the Department provided a partial payment of time loss compensation benefits to adjust for prior payments from May 25, 2002 through November 1, 2002, based on varying compensation rates. The order corrected and superseded orders dated June 20, 2002; July 2, 2002; July 16, 2002; July 30, 2002; August 13, 2002; August 27, 2002; September 10, 2002; September 24, 2002; October 8, 2002; October 22, 2002; and November 5, 2002.

On December 24, 2002, the Board extended the time to act on the appeal for an additional ten days. On January 3, 2003, the Board granted the appeal, assigned Docket No. 02 22295, and directed that further proceedings be held.

Docket No. 02 22296: Mr. Ferencak filed an appeal on November 25, 2002, from a Department order dated November 19, 2002, wherein the Department paid time loss compensation benefits from November 2, 2002 through November 15, 2002, and set the time loss compensation rate for the period at $1,409.42 per month or $46.98 per day.

On December 24, 2002, the Board extended the time to act on the appeal for an additional ten days. On January 3, 2003, the Board granted the appeal, assigned Docket No. 02 22296, and directed that further proceedings be held.

Docket No. 02 22794: Mr. Ferencak filed an appeal on December 6, 2002, from a Department order dated December 2, 2002, wherein the Department paid time loss compensation benefits from November 16, 2002 through November 24, 2002, and set the time loss compensation rate for the period at $1,531.28 per month or $51.04 per day. Time loss compensation benefits were ended as of November 25, 2002, because the worker was released to return to work.

On January 3, 2003, the Board granted the appeal, assigned Docket No. 02 22794, and directed that further proceedings be held.

Docket No. 03 15795: Mr. Ferencak filed an appeal on May 23, 2003, from a Department order dated May 20, 2003, wherein the Department paid time loss compensation benefits from April 21, 2003 through May 5, 2003, and set the time loss compensation rate for the period at $1,531.28 per month or $51.04 per day.

On June 23, 2003, the Board granted the appeal, assigned Docket No. 03 15795, and directed that further proceedings be held.

Docket No. 03 16196: Mr. Ferencak filed an appeal on June 4, 2003, from a Department order dated June 2, 2003, wherein the Department paid time loss compensation benefits from May 6, 2003 through May 27, 2003, and set the time loss compensation rate for the period at $1,531.28 per month or $51.04 per day.

On June 23, 2003, the Board granted the appeal, assigned Docket No. 03 16196, and directed that further proceedings be held.

Docket No. 03 16790: Mr. Ferencak filed an appeal on June 18, 2003, from a Department order dated June 16, 2003, wherein the Department paid time loss compensation benefits from May 28, 2003 through June 10, 2003.

On July 19, 2003, the Board extended the time to act on the appeal for an additional ten days. On July 25, 2003, the Board granted the appeal, assigned Docket No. 03 16790, and directed that further proceedings be held.

Docket No. 03 18398: Mr. Ferencak filed an appeal on July 3, 2003, from a Department order dated June 30, 2003, wherein the Department paid time loss compensation benefits from June 11, 2003 through June 24, 2003, and set the time loss compensation rate for the period at $1,531.28 per month or $51.04 per day.

On August 1, 2003, the Board extended the time to act on the appeal for an additional ten days. On August 8, 2003, the Board granted the appeal, assigned Docket No. 03 18398, and directed that further proceedings be held.

Docket No. 03 19097: Mr. Ferencak filed an appeal on July 18, 2003, from a Department order dated July 14, 2003, wherein the Department paid time loss compensation benefits from June 25, 2003 through July 8, 2003, and set the time loss compensation rate for the period of June 25, 2003 through June 30, 2003, at $1,531.28 per month or $51.04 per day. The time loss compensation rate for the period of July 1, 2003 through July 8, 2003, was set at $1,560.60 per month or $52.02 per day.

On August 8, 2003, the Board granted the appeal, assigned Docket No. 03 19097, and directed that further proceedings be held.

Docket No. 03 17975: Mr. Ferencak filed an appeal on July 30, 2003, from a Department order dated July 28, 2003, wherein the Department paid time loss compensation benefits from July 9, 2003 through July 22, 2003, and set the time loss compensation rate for the period at $1,560.52 per month or $52.02 per day.

On August 27, 2003, the Board granted the appeal, assigned Docket No. 03 17975, and directed that further proceedings be held.

Docket No. 03 20291: Mr. Ferencak filed an appeal on August 13, 2003, from a Department order dated August 11, 2003, wherein the Department paid time loss compensation benefits from July 23, 2003 through August 5, 2003, and set the time loss compensation rate for the period at $1,560.52 per month or $52.02 per day.

On August 27, 2003, the Board granted the appeal, assigned Docket No. 03 20291, and directed that further proceedings be held.

2. Ivan Ferencak is a Bosnian immigrant who does not understand or speak English. Mr. Ferencak became an employee of Travis Industries, Inc., on June 11, 2001. He was injured while acting in the course of employment with his company on March 20, 2002, when he lifted a heavy metal sheet, twisted, and something cracked or popped in his right knee.

3. On March 20, 2002, Travis Industries, Inc., employed Mr. Ferencak eight hours per day, five days per week, and paid him $10.50 in regular hourly wages.

4. At time of injury Mr. Ferencak had not established a pattern normally working additional overtime hours.

5. Travis Industries, Inc., paid the sum of $197.15 per month to a health care plan in order to ensure that Mr. Ferencak had insurance coverage for medical and dental care. This coverage began six months after Mr. Ferencak's initial date of hire, June 11, 2001.

6. Mr. Ferencak did not present evidence of any bonuses paid him by Travis Industries in the twelve months preceding the March 2002 injury.

7. As of March 20, 2002, Travis Industries, Inc., made payments on Mr. Ferencak's behalf to the Social Security Administration under the Federal Insurance Contributions Act, paid a federal tax toward the Medicare program on his behalf, and paid industrial insurance premiums and employment security taxes pursuant to state law.

8. The benefits enumerated in Finding of Fact No. 7 are not core, non fringe-benefits that were critical to protecting Mr. Ferencak's basic health and survival.

9. During all legal proceedings before the Board which required Mr. Ferencak's direct participation, a Bosnian/Serbo Croatian interpreter was provided to him at the Board's expense and at no cost to Mr. Ferencak.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of these appeals.

2. Ivan Ferencak was not entitled to have the Board pay the cost of an interpreter for communications between himself and his attorney regarding the processing of his claim within the guidelines of

Department policy or as contemplated by WAC 263-12-090 and Ch. 2.43 RCW.

3. As of March 20, 2002, Mr. Ferencak's monthly wages, as that term is used in RCW 51.08.178(1), included his hourly wages and the employer-paid value of health care benefits to which he was entitled, but the wages did not include any employer-paid contributions to social security, Medicare, life and/or disability insurance policies, 401(K) or money purchase pension plans, or to ensure that Mr. Ferencak had industrial insurance and unemployment compensation coverage. RCW 51.08.178(1) does not contemplate the inclusion of future potential wages increases, vacation days, or sick days accrued. RCW 51.08.178(1) and (3) include consideration of bonuses paid only in the twelve months preceding the injury.

4. The Department orders dated May 2, 2002 (Docket No. 02 23491); May 6, 2002 (Docket No. 02 21795); May 14, 2002 (Docket No. 02 23492); May 28, 2002 (Docket No. 02 23698); November 18, 2002 (Docket No. 02 22295); November 19, 2002 (Docket No. 02 22296); December 2, 2002 (Docket No. 02 22794); May 20, 2003 (Docket No. 03 15795); June 2, 2003 (Docket No. 03 16196); June 16, 2003 (Docket No. 03 16790); June 30, 2003 (Docket No. 03 18398); July 14, 2003 (Docket No. 03 19097); July 28, 2003 (Docket No. 03 17975); and August 11, 2003 (Docket No. 03 20291), are correct and are affirmed.

It is so **ORDERED**.

Dated this 18th day of October, 2005.

BOARD OF INDUSTRIAL INSURANCE APPEALS

THOMAS E. EGAN — Chairperson

FRANK E. FENNERTY, JR. — Member

CALHOUN DICKINSON — Member